

FILED

Jun 8, 2021

Disciplinary
Board

Docket # 006

DISCIPLINARY BOARD
WASHINGTON STATE BAR ASSOCIATION

Notice of Reprimand

Lawyer Marne B. Whitney, WSBA No. 41606, has been ordered Reprimanded by the following attached documents: Stipulation to Reprimand, Order on Stipulation to Reprimand.

WASHINGTON STATE BAR ASSOCIATION

N. Justine

Nicole Gustine
Counsel to the Disciplinary Board

CERTIFICATE OF SERVICE

By order of Washington Supreme Court Order No. 25700-B-609, I certify that I caused a copy of the Notice of Reprimand to be emailed to the Office of Disciplinary Counsel and to Respondent's Counsel Kenneth Scott Kagan, at ken@kenkaganlaw.com, on the 8th day of June, 2021.

A handwritten signature in black ink, appearing to be 'Neil J.', written in a cursive style.

Clerk to the Disciplinary Board

FILED

Jun 7, 2021

Disciplinary
Board

Docket # 003

DISCIPLINARY BOARD
WASHINGTON STATE BAR ASSOCIATION

In re

Marne B. Whitney,
Lawyer (Bar No. 41606).

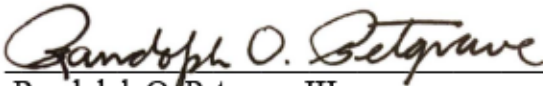
Proceeding No. 21#00013

ORDER ON STIPULATION TO
REPRIMAND

On review of the Stipulation to Reprimand, fully executed June 4, 2021, and the documents on file in this matter,

IT IS ORDERED that the Stipulation to Reprimand is approved.

Dated this 4th day of June, 2021.


Randolph O. Petgrave III
Chief Hearing Officer

CERTIFICATE OF SERVICE

By order of Washington Supreme Court Order No. 25700-B-609, I certify that I caused a copy of the Order on Stipulation to Reprimand to be emailed to the Office of Disciplinary Counsel and to Respondent's Counsel Kenneth Scott Kagan, at ken@kenkaganlaw.com, on the 7th day of June, 2021.

A handwritten signature in black ink, appearing to be "Neil A.", written in a cursive style.

Clerk to the Disciplinary Board

FILED

Jun 8, 2021

Disciplinary
Board

Docket # 005

DISCIPLINARY BOARD
WASHINGTON STATE BAR ASSOCIATION

In re

MARNE B. WHITNEY,

Lawyer (Bar No. 41606).

Proceeding No. 21#00013

ODC File No. 20-00686

STIPULATION TO REPRIMAND

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Under Rule 9.1 of the Washington Supreme Court's Rules for Enforcement of Lawyer Conduct (ELC), the following Stipulation to Reprimand is entered into by the Office of Disciplinary Counsel (ODC) of the Washington State Bar Association (Association) through Managing Disciplinary Counsel Joanne S. Abelson, Respondent's Counsel Kenneth Scott Kagan, and Respondent lawyer Marne B. Whitney.

Respondent understands that Respondent is entitled under the Rules for Enforcement of Lawyer Conduct (ELC) to a hearing, to present exhibits and witnesses on Respondent's behalf, and to have a hearing officer determine the facts, misconduct and sanction in this case. Respondent further understands that Respondent is entitled under the ELC to appeal the outcome of a hearing to the Disciplinary Board, and, in certain cases, the Supreme Court. Respondent further understands that a hearing and appeal could result in an outcome more favorable or less

1 favorable than the one stipulated to here. Respondent chooses to resolve this proceeding now by
2 entering into the following stipulation to facts, misconduct, and sanction to avoid the risk, time,
3 and expense attendant to further proceedings.

4 I. ADMISSION TO PRACTICE

5 1. Respondent was admitted to practice law in the State of Washington on August 31,
6 2009.

7 II. STIPULATED FACTS

8 2. The City of Marysville contracts with a private law firm (the Firm) to provide public
9 defense for the Marysville Municipal Court.

10 3. From April 2019 to June 2020, Respondent was an associate at the Firm and acted as
11 a public defender for clients charged with crimes by the City of Marysville.

12 4. For approximately eight months in 2019-2020, Respondent and a prosecutor at the
13 Marysville City Attorney's Office engaged in an intimate relationship.

14 5. During the intimate relationship, Respondent and the prosecutor appeared on opposite
15 sides of approximately 300 cases. None of these cases was taken to trial. Most were resolved by
16 direct negotiation between the two.

17 6. Respondent did not advise the Firm or any of Respondent's clients of the intimate
18 relationship.

19 7. Respondent stated neither Respondent nor the prosecutor divulged any confidential
20 information, strategy, or privileged information to each other, and that Respondent worked
21 extremely hard to get the best possible outcomes for her clients regardless of the intimate
22 relationship. ODC has no evidence to the contrary.

23 8. In June 2020, after the intimate relationship ended, the prosecutor advised a principal

1 at the Firm of the intimate relationship. The Firm then terminated Respondent's employment.

2 9. The Firm subsequently reviewed its case management system, identified nearly 600
3 clients (including cases where Respondent was attorney of record, filled in for other counsel, or
4 attended meetings) who potentially were impacted, and reached out to all identified clients. Two
5 clients opted to have conflict counsel assigned to explore any post-conviction relief.

6 10. The intimate relationship between Respondent and the prosecutor, and its potential
7 impact on the court system, generated local media coverage

8 III. STIPULATION TO MISCONDUCT

9 11. Respondent violated RPC 1.7(a)(2) and RPC 1.8(l) by engaging in an intimate
10 relationship with a prosecutor who was representing a party adverse to Respondent's clients.

11 IV. PRIOR DISCIPLINE

12 12. Respondent has no prior discipline.

13 V. APPLICATION OF ABA STANDARDS

14 13. The following American Bar Association Standards for Imposing Lawyer Sanctions
15 (1991 ed. & Feb. 1992 Supp.) applies to this case:

16 Standard 4.3 – Failure to Avoid Conflicts of Interest

17 **4.31** Disbarment is generally appropriate when a lawyer, without the informed consent of
18 client(s):

19 (a) engages in representation of a client knowing that the lawyer's interests are adverse to
20 the client's with the intent to benefit the lawyer or another, and causes serious or
21 potentially serious injury to the client; or

22 (b) simultaneously represents clients that the lawyer knows have adverse interests with
23 the intent to benefit the lawyer or another, and causes serious or potentially serious injury
24 to a client; or

(c) represents a client in a matter substantially related to a matter in which the interests of
a present or former client are materially adverse, and knowingly uses information relating
to the representation of a client with the intent to benefit the lawyer or another and causes
serious or potentially serious injury to a client.

4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest

1 and does not fully disclose to a client the possible effect of that conflict, and causes injury
2 or potential injury to a client.

3 **4.33** Reprimand is generally appropriate when a lawyer is negligent in determining
4 whether the representation of a client may be materially affected by the lawyer's own
interests, or whether the representation will adversely affect another client, and causes
injury or potential injury to a client.

5 **4.34** Admonition is generally appropriate when a lawyer engages in an isolated instance
6 of negligence in determining whether the representation of a client may be materially
7 affected by the lawyer's own interests, or whether the representation will adversely affect
another client, and causes little or no actual or potential injury to a client.

8 14. Respondent acted knowingly.

9 15. There was potential injury to Respondent's clients given the consequences to the cases
10 Respondent handled opposite the prosecutor during the intimate relationship. See People v.
11 Jackson, 167 Cal. App. 3d 829, 832-33, 213 Cal. Rptr. 521 (1985) (conflict of interest from
12 undisclosed "dating" relationship between prosecutor and defense counsel led to reversal of
13 conviction based on ineffective assistance of counsel). In addition, Respondent's conduct
14 threatened the integrity of the criminal justice system and public confidence in the court system
and the profession.

15 16. The presumptive sanction is Suspension under ABA Standard 4.32

16 17. The following aggravating factors apply under ABA Standard 9.22:

17 (b) selfish motive;

18 (i) substantial experience in the practice of law [admitted 2009].

19 18. The following mitigating factors apply under ABA Standard 9.32:

20 (a) absence of a prior disciplinary record;

21 (l) remorse.

22 19. It is an additional mitigating factor that Respondent has agreed to resolve this matter
at an early stage of the proceedings.

23 20. On balance, based on the factors set forth above, the parties agree that the presumptive

1 sanction should be mitigated to a reprimand.

2 **VI. STIPULATED DISCIPLINE**

3 21. The parties stipulate that Respondent shall receive a reprimand.

4 **VII. RESTITUTION**

5 22. No restitution is required by this stipulation.

6 **VIII. COSTS AND EXPENSES**

7 23. In light of Respondent's willingness to resolve this matter by stipulation at an early
8 stage of the proceedings, Respondent shall pay attorney fees and administrative costs of \$750 in
9 accordance with ELC 13.9(i). The Association will seek a money judgment under ELC 13.9(l) if
10 these costs are not paid within 30 days of approval of this stipulation.

11 **IX. VOLUNTARY AGREEMENT**

12 24. Respondent states that, prior to entering into this Stipulation, Respondent has
13 consulted independent legal counsel regarding this Stipulation, that Respondent is entering into
14 this Stipulation voluntarily, and that no promises or threats have been made by ODC, the
15 Association, nor by any representative thereof, to induce the Respondent to enter into this
16 Stipulation except as provided herein.

17 25. Once fully executed, this stipulation is a contract governed by the legal principles
18 applicable to contracts, and may not be unilaterally revoked or modified by either party.

19 **X. LIMITATIONS**

20 26. This Stipulation is a compromise agreement intended to resolve this matter in
21 accordance with the purposes of lawyer discipline while avoiding further proceedings and the
22 expenditure of additional resources by the Respondent and ODC. Both Respondent and ODC
23 acknowledge that the result after further proceedings in this matter might differ from the result

1 | agreed to herein.

2 | 27. This Stipulation is not binding upon ODC or Respondent as a statement of all existing
3 | facts relating to the professional conduct of the respondent lawyer, and any additional existing
4 | facts may be proven in any subsequent disciplinary proceedings.

5 | 28. This Stipulation results from the consideration of various factors by both parties,
6 | including the benefits to both by promptly resolving this matter without the time and expense of
7 | hearings, Disciplinary Board appeals, and Supreme Court appeals or petitions for review. As
8 | such, approval of this Stipulation will not constitute precedent in determining the appropriate
9 | sanction to be imposed in other cases; but, if approved, this Stipulation will be admissible in
10 | subsequent proceedings against Respondent to the same extent as any other approved Stipulation.

11 | 29. Under ELC 3.1(b), all documents that form the record before the Chief Hearing
12 | Officer for review become public information on approval of the Stipulation by the Chief Hearing
13 | Officer, unless disclosure is restricted by order or rule of law.

14 | 30. If this Stipulation is approved by the Chief Hearing Officer, it will be followed by the
15 | disciplinary action agreed to in this Stipulation. All notices required in the ELC will be made.
16 | Respondent represents that, in addition to Washington, Respondent also is admitted to practice
17 | law in the following jurisdictions, whether current status is active, inactive, or suspended:
18 | Nebraska.

19 | 31. If this Stipulation is not approved by the Chief Hearing Officer, this Stipulation will
20 | have no force or effect, and neither it nor the fact of its execution will be admissible as evidence
21 | in the pending disciplinary proceeding, in any subsequent disciplinary proceeding, or in any civil
22 | or criminal action.

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WHEREFORE the undersigned being fully advised, adopt and agree to this Stipulation to Reprimand as set forth above.


Marne B. Whitney, Bar No. 41606
Respondent

Dated: 6/3/21


Kenneth Scott Kagan, Bar No. 12983
Counsel for Respondent

Dated: 6/3/2021


Joanne S. Abelson, Bar No. 24877
Managing Disciplinary Counsel

Dated: 6/4/21